



January 21, 2020

VIA ELECTRONIC FILING

The Honorable Jocelyn Boyd
Public Service Commission of South Carolina
101 Executive Center Drive
Columbia, South Carolina 29211

RE: South Carolina Energy Freedom Act (House Bill 3659) Proceeding
Related to S.C. Code Ann. Section 58-37-40 and Integrated Resource
Plans for Dominion Energy South Carolina, Incorporated
Docket No. 2019-226-E

Dear Ms Boyd:

I am writing on behalf of Dominion Energy South Carolina, Inc. ("DESC") concerning the January 30, 2020 generic workshop scheduled in the above captioned docket by the Public Service Commission of South Carolina ("Commission"). DESC appreciates the Commission's desire to advance its understanding of the integrated resource planning ("IRP") filings that DESC and other electric utilities will make under S.C. Code Ann. § 58-37-40, and the positions that other interested parties are planning to assert in those dockets. DESC has reviewed the January 14, 2020 letter filed by Duke Energy Carolinas, LLC and Duke Energy Progress, LLC (together, "Duke Energy") in Docket Nos. 2019-224-E and 2019-225-E which are the companion dockets to this one. DESC shares Duke Energy's concern that participation in a scheduled workshop may put the workshop participants and the Commission at risk of non-compliance with the ex parte communication rules set forth in S.C. Code Ann. §§ 58-3-260 *et seq.*

The applicable language of S.C. Code Ann. § 58-3-260(B) states as follows:

Except as otherwise provided herein or unless required for the disposition of ex parte matters specifically authorized by law, a commissioner, hearing officer, or commission employee shall not communicate, directly or indirectly, regarding any issue that is an issue in any proceeding or can reasonably be expected to become an issue in any proceeding with any person without notice and opportunity for all parties to participate in the communication, nor shall any person communicate, directly or indirectly, regarding any issue that is an issue in any proceeding or can reasonably be expected to become an issue in

(Continued . . .)

any proceeding with any commissioner, hearing officer, or commission employee without notice and opportunity for all parties to participate in the communication.

S.C. Code Ann. § 58-3-260(B).

The workshop scheduled in this docket is intended to explore the issues that parties are likely to raise in the forthcoming IRP filings. While exploring these issues is a commendable goal, from an ex parte standpoint it means that the workshop will involve interested parties “communicat[ing], directly or indirectly” with “commissioner[s], hearing officer[s] or commission employee[s]” regarding matters that “can reasonably be expected to become an issue in ... future [IRP] proceeding[s].” S.C. Code Ann. § 58-3-260(B). The lawfulness of the intended communications will then depend on whether notice and opportunity has been provided “*for all parties to participate in the communication.*” S.C. Code Ann. § 58-3-260(B)(emphasis supplied).

In its letter, Duke Energy explained that it is not possible at this time to know who the parties to the utilities’ upcoming IRP dockets may be. In fact, public notices for these IRP dockets have not been issued and an intervention deadline has not been established. Therefore, who will intervene and become a party in these proceedings cannot be known. Moreover, it is not possible to say that notice given to the *participants in the workshop* will be sufficient to ensure notice has been provided to *all parties in the forthcoming IRP dockets* that important issues pertaining to those dockets will be discussed with the Commission and its staff.

In this regard, it is worth noting that a workshop is not a proceeding defined by statute or regulation. It does not involve a request for relief. Therefore, it can be neither an application, a complaint, nor a petition as those terms are defined by the Commission’s regulations. S.C. Reg. Ann. §§ 103-823, 103-824, 103-825. A workshop also does not fit within the Administrative Procedures Act definition of a contested case. S.C. Code Ann. §§ 1-23-310 *et seq.* Given the workshop’s uncertain procedural underpinnings, there is risk involved in assuming that holding an ex parte discussion in a workshop, even if that discussion were duly noticed to workshop participants, would be sufficient to insulate them and the Commission from challenge under S.C. Code Ann. § 58-3-260(B).

Furthermore, if it is the intention of the workshop to formulate guidance documents to direct the utilities in preparing and filing their IRPs, those guidance documents would need to take the form of regulations. See, S.C. Code Ann. §§ 1-23-10 *et seq.* In Act No. 62, the General Assembly has expressly provided for the Commission to issue regulations to the extent necessary “to carry out the provisions of this section.” S.C. Code Ann. § 58-37-40(E). “A statute which provides that a thing shall be done in a certain way carries with it an implied prohibition against doing

(Continued . . .)

The Honorable Jocelyn Boyd

January 21, 2020

Page 3

that thing in any other way. Thus, the method prescribed in a statute for enforcing the rights provided in it is likewise presumed to be exclusive.” J. Singer, *Statutes and Statutory Construction* § 47:23 (7th ed. 2019)); accord *Christensen v. Harris Cty.*, 529 U.S. 576, 583 (2000) (“[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode”); *Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) (“[t]he canon of construction *expressio unius est exclusio alterius*’ or *inclusio unius est exclusio alterius*’ holds that to express or include one thing implies the exclusion of another, or of the alternative”) (citations omitted). Regulations would be the only lawful means of defining standards and procedures under the S.C. Code Ann. § 58-37-40.

For these reasons, DESC is expressing its concern regarding the use of a workshop as part of the process of defining the requirements of S.C. Code Ann. § 58-37-40 to apply in future IRP filings. But as Duke Energy has articulated, the General Assembly has provided the Commission with procedures specifically intended to allow communications such as those envisioned in the January 30, 2020 workshop through the allowable ex parte communication briefing process defined in S.C. Code Ann. § 58-3-260(C)(6). Conducting allowable ex parte communication briefings is the safest and most effective way for the Commission to receive information concerning parties plans and positions as to future IRP proceedings.

Based upon the foregoing and in light of its concerns related to compliance with S.C. Code Ann. § 58-3-260(C), DESC does not intend to participate in the workshop scheduled in Docket No. 2019-226-E. Instead, DESC will contact the Commission Staff to identify a suitable date to schedule such an allowable ex parte communication briefing and after that task is accomplished, DESC will submit a formal request for a briefing before the Commission.

In addition to informing the Commission of its intent to not participate in the IRP workshop, DESC also takes this opportunity to respond to certain statements made by the South Carolina Coastal Conversation League (“CCL”) and the Southern Alliance for Clean Energy (“SACE”) in its letter to the Commission dated January 17, 2020. In its January 17, 2020 letter, CCL and SACE state that DESC “[i]s apparently planning to file its IRP in late February,” and argues that doing so would be improper.

DESC intends to file its IRP with the Commission on February 28, 2020. As a reminder, by letter dated June 17, 2019, DESC informed the Commission as follows:

As reflected in Docket No. 2019-9-E, [Dominion Energy] filed its current IRP on February 8, 2019. . . . [Dominion Energy] intends to follow its historical practice to update its IRP in February each year, and proposes to file an updated IRP in compliance with the requirements of the newly enacted S.C. Code Ann. § 58-41-40(A) on February 28, 2020.

(Continued . . .)

By letter dated July 5, 2019, DESC reaffirmed its intention to file its updated IRP on February 28, 2020.

In adopting Act No. 62 of 2019 ("Act No. 62"), the General Assembly required electric utilities to update their IRP filings annually. S.C. Code Ann. § 58-37-40(D)(1). In Act 62, the General Assembly provided clear, detailed and comprehensive guidance concerning the structure and process for future IRP filings. See S.C. Code Ann. § 58-37-40. DESC intends to meet its obligations under S.C. Code Ann. § 58-37-40 by filing an updated IRP on February 28, 2020 that complies in all respects with statutory mandates set forth in Act No. 62. Dominion Energy does not believe that the proceedings contemplated in this docket exempt it from its obligation to comply with the clear mandates of Act No. 62.

If you have any questions, please advise.

Very truly yours,



K. Chad Burgess

KCB/kms

cc: Andrew Bateman, Esquire
Becky Dover, Esquire
Carri Grube Lybarker, Esquire
J. Blanding Holman, IV, Esquire
James Goldin, Esquire
Jeffrey M. Nelson, Esquire
Jeremy C. Hodges, Esquire
Nanette S. Edwards, Esquire